Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as Executors of the last Will and Testament of Henriette S. Lachman, deceased, Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California.

No. 303.

HARRIET L. LEVY, PAULINE JACOBS, and ADELINE SALINGER, Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California.

In Error to the District Court of the United States for the Northern District of California.

Brief on behalf of Frederick W. De Foe, as Administrator of the Estate of Augusta L. Cummings, Deceased, and of Frederick W. De Foe, Cyrus C. Yawkey and Leland G. Gardner, as Trustees under a Trust Deed Executed by said Decedent on February 1st, 1912, as *Amici Curiae*.

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BRIEF ON BEHALF OF FREDERICK W. DeFOE, AS ADMINISTRATOR OF THE ESTATE OF AUGUSTA L. CUMMINGS, DECEASED, AND OF FREDERICK W. DeFOE, CYRUS C. YAWKEY AND LELAND G. GARDNER, AS TRUSTEES UNDER A TRUST DEED EXECUTED BY SAID DECEDENT ON FEBRUARY 1ST, 1912, AS AMICI CURIAE.

The interest of the parties, above named as *amici curiae*, in the above-entitled causes rests upon the following state of facts:

Augusta L. Cummings died on September 5, 1918, possessed of an estate of approximately Five Hundred Thousand Dollars ($500,000). On February 1st, 1912, she had made a trust deed by which she transferred to the trustees therein named the major part of her property for the uses and purposes described in the deed. Under those trusts a large part of the income was to be paid annually to the settlor. The trust term was to continue during the life of the settlor, and in the event (which has happened) of her death before her son should reach the age of twenty-five years, was to continue until he should have reached that age or until his earlier decease; the son is still alive and has not yet reached the age of twenty-five years and the trust, therefore, still continues. The deed contained no power of revocation, nor was the property conveyed thereby any part of the estate of the settlor at her death. The settlor did reserve in the deed the right at any time after February 21st, 1928 (that being the date on which her son would become twenty-five) to direct as to one-half of the trust estate a disposition differing from that expressed in the trust deed, in view of any changed conditions that might then exist. It will, of course, be apparent that, the settlor, having died in 1918, never enjoyed the power so reserved, and never had, from the date of the execution of the trust deed until the date of her death, any power or control of any kind over the trust estate.

The Commissioner of Internal Revenue ruled that the trust deed made by the deceased on February 1st, 1912, was intended to take effect in pos-

session or enjoyment at or after her death, and that the property transferred should be included in the net estate upon which the Federal estate tax was computed. The value of the trust estate, calculated as of the date of her death, was such that the estate tax payable upon the Commissioner's theory amounted to $1,263,644.53, or more than twice the value of the entire estate which the decedent owned at her death and which came into the possession of her administrator. The tax was paid under compulsion and under protest. Such payment wholly wiped out the estate in the hands of the administrator, and the payment of the balance of the tax, amounting to over Eight Hundred Thousand Dollars ($800,000) was made from property of the trust estate in the hands of the trustees.

The above facts are stated thus briefly as evidence of the standing of those on behalf of whom this brief is filed to appear as *amici curiae*. Those facts do, however, throw strong light upon the oppressive consequences which inevitably flow from the departmental construction of the Estate Tax Law as necessitating the inclusion, as if part of the decedent's estate, for the purposes of taxation, of property with which the decedent had validly and irrevocably parted long prior to the passage of the Act. Many striking examples showing clearly that such construction results often in practical confiscation of property are given in the briefs on behalf of the plaintiffs in error themselves, and there is no necessity for repeating them.

Mrs. Cummings parted in 1912 with the property embraced in the trust deed. She never had any power to regain possession of that property,

yet the fact that she had made that disposition subjected her, on the Government's theory, to a tax which completely wiped out her remaining estate, and thus destroyed any opportunity she might otherwise have had to dispose of her remaining property by will. In the face of this practical demonstration, the statement contained in the brief of the plaintiff in error in No. 236,—that a donor who had made irrevocable gifts of property long before anyone had any reason to contemplate the enactment of the 1916 law might find it impossible to make suitable, or even any, provision for his wife and children,—cannot be dismissed as fanciful.

The questions involved in the present cases are two:

(1) Was it the intention of Congress to impose a tax upon transfers made or trusts created prior to the enactment of the Estate Tax Law of 1916, by requiring the inclusion of the property so transferred in the net estate upon which the tax is calculated, although neither at the time of the passage of the Act nor at the time of his death was the property in any manner subject to the disposition or control of the decedent;

(2) If the Act necessitates such a construction, is it constitutional?

I.

The Constitutional Basis of the Federal Estate Tax.

Under the power to impose "death duties", Congress may tax without apportionment the "power to transmit or the transmission or receipt of property by death." The tax may be either upon the transmission of property by the decedent at his death or upon the receipt thereof by the beneficiary. The Act of 1916, unlike its predecessors, imposes the tax upon the transmission. The tax being an excise on the privilege of transmitting property can only be imposed where such privilege is exercised subsequent to the passage of the law.

From early times this court has held that taxes which may properly be classified as "death duties", although usually measured by the value of property and incapable of being shifted, do not constitute direct taxes. The reason was historical.

This court has held that Congress had authority to impose without apportionment a tax upon the recipient of a succession to real estate based upon the value of the privilege of receiving it (*Scholey* v. *Rew*, 23 Wall. 331); a tax upon the recipient of a legacy based upon the value of such legacy (*Knowlton* v. *Moore*, 178 U. S. 41); and the tax of 1916 upon the transmission of property by will, based upon the value of the property so transmitted (*New York Trust Co.* v. *Eisner*, 256 U. S. 345). In the case last cited this Court said:

> "* * * this kind of tax always has been regarded as the antithesis of a direct tax;

'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81, 83. Upon this point a page of history is worth a volume of logic."

What, then, is "this kind of tax," to which this Court in its most recent decision has referred? The essential characteristics of a death duty have been fully stated in *Knowlton* v. *Moore, supra.* Death duties are, in the language of Mr. Justice White, laid upon

"the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the *transmission from the dead to the living,* on which such taxes are more immediately rested" (italics ours). (178 U. S. p. 56).

Again he says (p. 47) that

"the public contribution which death duties exact is predicated on the *passing of property as the result of death,* as distinct from a tax on property disassociated from its *transmission or receipt by will, or as the result of intestacy*" (italics ours).

This phraseology runs through the entire opinion. Thus (p. 57):

"It is the power to transmit or the *transmission or receipt of property by death* which is the subject levied upon by all death duties" (italics ours).

In later cases in which this Court has had occasion to discuss the distinction between direct and indirect taxation, the decision in *Knowlton* v. *Moore, supra,* has been rested expressly upon

this ground. See for instance *Thomas* v. *United States*, 192 U. S., 363, 370, mentioning the taxes sustained in *Knowlton* v. *Moore*, 178 U. S. 41, as being "on the *transmission of property from the dead to the living*" (italics ours). The same phrase is used in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, in a footnote, page 159, summarizing the taxes which this Court had held to be true excise taxes.

The death duties which this Court had sustained prior to the case of *New York Trust Co.* v. *Eisner*, *supra*, had been taxes upon the privilege of *receiving* property. In the case last cited this Court held that the constitutional power applied as well to taxes upon the estate of the donor, based upon the privilege of *transmitting* the property.

The fact that the constitutional basis of the two taxes is the same, however, does not mean that the nature of the tax is the same. There are important differences between the tax upon the receipt and the tax upon the transmission of property which render certain decisions of this Court construing prior Congressional death duties inapplicable to the taxing act now under discussion.

The present Federal estate tax is not a legacy or succession or inheritance tax. This is recognized in the first place by the Treasury Department itself. See Article I of Regulations 37, Revised, of the Bureau of Internal Revenue as follows:

> "The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax".

The same conclusion has been reached in the State Courts which have had occasion to construe

the act (see *Matter of Sherman*, 179 App. Div., 497, 500, affirmed 222 N. Y. 540; *Matter of Hamlin*, 226 N. Y. 407; *Corbin* v. *Townshend*, 92 Conn. 501, 505; *In re Knight's Estate*, 261 Pa. 537; *People* v. *Pasfield*, 284 Ill. 450; *Estate of Roebling*, 89 N. J. Eq. 163; *State* v. *Probate Court*, 139 Minn., 210; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471.

The former death duties imposed by Congress, commencing with the legacy tax imposed in the year 1797, were described in the opinion of this Court in *Knowlton* v. *Moore*, 178 U. S. pp. 50-53. They were all legacy, inheritance or succession taxes, under which system of taxation "the passing of each particular gift or distributive share of both the personal and real estate" was "treated as separate, one from the other, and each as forming a distinct estate subject to taxation". *Knowlton* v. *Moore*, 178 U. S. p. 68. The salient feature of these acts was that it was the *receipt* of the property which was the privilege taxed.

The constitutionality of the Succession Tax Law of 1864 (13 Stat. 287), as applied to a devise by a decedent who died in 1869, was sustained in *Scholey* v. *Rew*, 23 Wall., 331, upon the ground that (pp. 348-349):

> "The subject matter of the assessment is the *devolution* of the estate or the *right* to become beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the section." (Italics ours).

Section 127 of the Act of 1864 (13 Stat. 287, 288) provided as follows:

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> "Sec. 127. And be it further enacted, That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer, on the person entitled by reason of any such disposition, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived".

As a matter of construction the Court held in *Wright* v. *Blakeslee*, 101 U. S. 174, that the tax was assessable when a contingent remainder created prior to the passage of the act was transformed into an "estate in fee in possession absolute" by reason of a death occurring after such passage.

No constitutional question was raised or considered in *Wright* v. *Blakeslee*. The reason for this is plain. The case was long prior to *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601, in which the now accepted rule that a tax may be a direct tax, though not stated to be laid upon real property as such, if it was in fact laid upon one of the essential incidents of ownership thereof, was for the first time enunciated. It must also be noted that the tax in *Wright* v. *Blakeslee* was not laid merely upon the coming into possession of an estate, but the Court emphasized the fact that prior to the death of the life tenant, no estate had vested. Moreover, the tax considered in *Wright* v. *Blakeslee*, *supra*, was upon the receipt of property and levied against the recipient.

That case, therefore, furnishes no support to an argument that the application of the Estate Tax Law of 1916 to transfers fully consummated *inter vivos* before the passage of that Act would be constitutional, first, because no constitutional question was involved in *Wright* v. *Blakeslee*, second, because there was a change in the title to the corpus of the property after the passage of the Act, third, because the tax was levied against the recipient whose bare contingent remainder was transformed after the Act into an estate in fee simple absolute; if the Estate Tax Law of 1916 were to be applied to the situation presented in *Wright* v. *Blakeslee*, it would mean that the tax would be levied against the life tenant which is, we submit, a wholly different proposition.

The Act of 1916 not only does not impose a succession tax in general with respect to the property of the decedent transmitted at his death, but so far as it applies to transfers executed or trusts created during the decedent's lifetime it is equally clear that it is not a succession tax. The entire tax is payable by the executor or administrator of the decedent out of the estate left by the decedent before its distribution. The provision of Section 200 that the term "executor" shall embrace "any person who takes possession of any property of the decedent" applies only where "there is no executor or administrator." Further this provision refers to one taking possession "of any property of the decedent." One holding as transferee or trustee under a valid transfer executed in the lifetime of the decedent is not in possession of the property of the decedent, as the property has already passed from the decedent, and this is none the less true because a remainder-

man may come into possession at or after the decedent's death.

The obligation under Section 205 of every person "holding a legal or beneficial interest" in what is termed the "gross estate" to make a return "as to such part of the gross estate" where the executor fails to make a complete return, does not alter the liability for the payment of the tax.

The statute provides that "the executor shall pay the tax to the collector or deputy collector" (Section 207). If there is an executor or administrator, and if there is an estate in his hands as such, it is plainly his duty to pay the entire estate tax before that estate is distributed. In case the tax is thus paid by the executor or administrator out of the decedent's estate in his hands, no part of the tax is repayable to the executor or administrator by the transferee or trustee or beneficiary of any property transferred during the decedent's lifetime notwithstanding that there is a coming into possession of an interest on the decedent's death, and notwithstanding that this interest is to be included in fixing the value of the "gross estate" for the purpose of arriving at the "net estate" and thus at the amount of the tax. As the facts of this case show, the tax may exhaust the entire estate in the hands of the executor or administrator.

It is only when the tax is not paid when due that the transferee or trustee is made liable for the tax under Section 209 of the Act of 1916. This provision, however, does not alter the nature of the tax. When the transferee or trustee is compelled to pay the tax, it is not payable as a succession tax, but because of the absence of an estate of the decedent which would otherwise bear the tax, and

because the property transferred is in that case constructively considered to be a part of the estate of the decedent and taxable as such. That the tax is not a succession tax is made even clearer by the provision of Section 208 that if any part of the tax is paid by such transferee or trustee, that is, by "any person other than the executor in his capacity as such", such person is entitled to reimbursement "out of any part of the estate still undistributed"; and that section expressly states that it is "the purpose and intent" of the Act that the tax "so far as is practicable, and unless otherwise directed by the will of the decedent", shall be paid "out of the estate before its distribution."

Nothing could more clearly show that the present act does not impose a tax on the coming into possession than the facts of the present case. The trust term specified in Mrs. Cummings' deed has not yet expired and will not expire until February 21, 1928, or the earlier death of her son. If this tax were a tax on coming into possession its payment would necessarily be postponed until that date. Such is certainly not the governmental construction.

Even if we were to concede,—which we do not,—that Congress has the constitutional power to levy a tax upon the coming into possession or enjoyment, upon the occasion of a death occurring after the passage of the Act, although title to the property had passed prior to its passage, that power would not sustain the attempt of the Treasury Department to include in the taxable estate under the Act of 1916, property which had been transferred prior to the Act. The existence of Congressional power, and the exercise of Congressional power are two very different things. Thus

it was suggested in *Eisner* v. *Macomber*, 252 U. S. 189, that Congress had constitutional power to levy an excise tax upon the privilege of receiving a stock dividend, but the existence of that power could not be availed of to justify the taxation of the stock dividend as income under an Act which could not fairly be construed as anything but an income tax law. So in the present case the tax is a tax upon the donor's estate by reason of the transmission of the net estate, and it cannot be sustained by any suggestion of a constitutional power of Congress to impose an entirely different sort of tax based upon the coming into possession or enjoyment by the donee, if indeed such power exists. "The distinction," said Judge Rose in *Curley* v. *Tait*, 276 Fed. 840, 843, distinguishing *Wright* v. *Blakeslee*, *supra*, "is neither pedantic nor technical, but, as applied to the matter now in hand, is in the highest degree practical."

The tax imposed by the Act of 1916 is called by the Treasury Regulations a "Transfer Tax", and the Act itself (Section 201) states that the tax is imposed on "the transfer of the net estate of every decedent dying after the passage of this Act." Plainly, however, as the concept of a transfer necessarily involves the passing of an interest, the tax cannot be regarded as a "transfer tax" unless it is imposed either upon the receipt or upon the transmission of property. If it were imposed upon the receipt of property it would be a legacy, inheritance or succession tax; we have seen that it is not such. If it is a transfer tax, therefore, it must be upon the transmission of property and so it has been construed. It also seems plain that Congress consciously intended to lay the tax upon the transmission rather than

upon the receipt of the property. This is in accordance with the Report of the Committee on Ways and Means indicating the plan of the framers of the Act of 1916 to establish an Estate Tax as distinguished from legacy, inheritance or succession taxes such as had been imposed by the previous acts of Congress and such as are now in force in many states. The Report of the Committee said (Report No. 922, 64th Congress, First Session):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs, twelve other states have laws imposing inheritance taxes upon collateral heirs. Your Committee deemed it advisable to recommend a Federal Estate Tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal Estate Tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares."

It is thus apparent that while the state laws form the basis for the language used in the present act, the imposition of the tax and its burden were deliberately placed upon the estate of decedent and not upon the recipient of any benefits which might accrue on the occasion of death. Congress hoped to derive important advantages thereby. Thus in levying a tax upon the transmission of property Congress could regard the property of the decedent collectively and apply the graduated rates to the entire estate thus transmitted, though a tax upon the receipt of property

would have to be regarded distributively with respect to each interest received (*Knowlton v. Moore, supra*). The tax actually laid is more analogous to a probate duty of the sort described by Mr. Justice White in *Knowlton* v. *Moore*, 178 U. S. p. 68, though it differs from a probate duty in that it may exhaust the entire estate. The necessity of distinguishing between the two kinds of death duty, that is, the duty laid upon the receipt of the estate and the duty laid upon the transmission of the estate, is well expressed in *Hanson on Death Duties*, p. 63, quoted in *Knowlton* v. *Moore*, 178 U. S. at p. 49, as follows:

> "The new duty imposed by the Finance Act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject."

The estate which is transmitted at death, and so is unquestionably the proper subject of a death duty based upon the occasion of such transmission is thus the estate of which a decedent died seized after the passage of the Act.

It is evident that distinct questions are presented where the property concerned is not a part of the decedent's estate at his death, but has been

transferred by valid instruments which took effect in his lifetime.

Some transfers, though in form made during the decedent's lifetime, are really testamentary in character, that is, ambulatory, taking no real effect until his death. The most conspicuous example is a gift *causa mortis*, which has usually been regarded as not effective until the death of the donor. See *Matter of Seaman*, 147 N. Y. 69. Another class of such ambulatory instruments is that in which the donor reserves to himself complete and continuous power to retake the property. In such case the property may be said not to have passed beyond the control of the donor during his life. He may regain possession or make a different disposition thereof at any time. As this Court said in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630, concerning a deed in which the grantor had retained a complete power of disposition:

> "The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax, 'To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes.' "

Therefore a tax upon such ambulatory instruments at the death of the donor might reasonably be classified as a death duty upon the ground that substantially speaking the property was a part of the donor's estate at his death.

In addition to these ambulatory instruments, however, there are other forms of transfer which, though not ambulatory, or in any sense testamentary in character, have been commonly included in inheritance tax statutes. The first class is that of gifts made, not *causa mortis* in the sense of not

taking effect until death, but made "in contemplation of death". Such instruments take effect *inter vivos*, but the fear of death, and often the desire to avoid an existing inheritance tax, furnish the motive therefor. Another class of transfers *inter vivos* is that with which these cases are concerned, namely, deeds of trust made without power of revocation but reserving to the grantor the income of the property during his life.

The power of the States to tax transfers by such deeds of trust has been placed upon the ground that "there is no natural right to create artificial and technical estates with limitations over" (*Keeney* v. *New York*, 222 U. S. 525, 533) and that such a conveyance would be "often resorted to as a means of evading the inheritance tax" (*Id.*, p. 536). While there was a power of revocation in the trust deed considered in the *Keeney* case, no point seem to have been made of this fact by either side. The Court carefully distinguished the feature of the New York Act which was before it in the *Keeney* case from so much of the statute "as imposes an inheritance tax," i. e. a death duty (222 U. S., p. 533), and its decision that the tax was imposed upon the transfer *inter vivos* and not upon the occasion of death was necessary because between the date of the transfer and the date of the death the donor had ceased to reside in New York. The Court held that, as he was a resident of New York at the time of the transfer, it was taxable.

That the tax was not a death duty was recognized by the New York Court of Appeals in the same case, *Matter of Keeney*, 194 N. Y. 281, where the court in holding the transfer taxable as coming within the phrase "intended to take effect in

possession or enjoyment at or after death" said (p. 285):

> "It is not an inheritance or succession tax, but it is not necessary that it should be such to support the statute imposing it."

This view of the nature of the tax imposed on such a transfer was not dissented from by this court.

We submit that the power of Congress to tax irrevocable transfers, in which the grantor merely reserves income during his life, must rest either upon the ground that such a power is necessary to prevent evasion of the death duty and so is necessarily incident to the power to impose the death duty, or it must rest upon some ground having nothing to do with death duties, but analogous to the right of Congress to tax certain peculiar forms of transfer, of which the stamp duty on sales of shares of stock in corporations which was sustained as an excise in *Thomas* v. *United States*, 192 U. S. 363, furnishes an example.

Whichever is the true ground of the power of Congress to include such transfers *inter vivos* in the statute imposing the death duty, neither furnishes the slightest justification for an imposition of the tax upon transfers irrevocably effectuated prior to the passage of the act. If the true ground is that the power to impose the death duty presupposes the power to prevent evasion thereof, it is sufficient to say that there can be no evasion of a tax which has not yet been imposed. If the ground is the power to tax as a privilege the making of a transfer of this peculiar nature, we may point to the unbroken line of authority (cited

at pages 38 to 49 of the brief for plaintiff-in-error in No. 236) that such a tax imposed as upon a privilege cannot be laid when the privilege has been fully exercised before the passage of the taxing act. This feature will be more fully developed in another point.

Concluding, therefore, the discussion of the nature of the tax imposed by the Act of 1916 and the constitutional basis thereof, we submit that it is clear:

(1) That insofar as the tax is laid upon the estate of the decedent, which passes by will or under the intestate laws, it is a true death duty imposed upon the *transmission* of the decedent's estate;

(2) Insofar as the tax is imposed upon gifts *causa mortis* or other ambulatory instruments of a testamentary character, it may be also properly classified as a death duty;

(3) Insofar as it attempts to include property conveyed by irrevocable transfers *inter vivos* made subsequent to the passage of the Act, it may perhaps be sustained on the ground that such provisions are necessary to prevent evasion of the death duty, or upon the power of Congress to tax certain forms of transfer *inter vivos;*

(4) But the inclusion of property which had been conveyed by an irrevocable transfer *inter vivos* completely effectuated prior to the passage of the taxing act may not be referred to any hitherto recognized power of Congress.

II.

If the Estate Tax Law of 1916 be construed so as to levy a tax upon the executor upon the value of property which was not transmitted upon the death of decedent, but which had been validly transferred by him prior to the passage of the law and over which he had at the time of his death no power of disposition, the Act would be beyond the constitutional power of Congress.

Property which has passed under a valid transfer in the decedent's lifetime and over which he has no control at the time of his death cannot on any admissible theory be regarded as transmitted by reason of his death. The present Act being as above shown a tax upon the transmission of property by the decedent finds its only normal application to the case of property which is actually, or may properly be deemed to be constructively, a part of his estate at death.

We have shown above that the Act, insofar as it deals with irrevocable transfers *inter vivos*, does not in fact impose a death duty at all. In grouping under one taxing act, however, some taxes which are true death duties, and other taxes which are not death duties but are taxes upon transfers which might otherwise be availed of to avoid the imposition of the death duties, it follows precedents established by the inheritance tax laws of the several states. (*Keeney* v. *New York, supra*). It is true that the Federal Estate Tax is a more glaring example of confusion of death duties with taxes which are not death duties than the laws of the several states, because those laws impose inheritance taxes, namely, taxes upon

the receipt rather than upon the transmission of property, and it is the distinguishing feature of such laws that the estate is regarded distributively and each transfer is separately considered for the purpose of the graduated rates. The Federal Estate Tax goes one step further and introduces the feature of a "constructive estate", that is, it treats the transfers at death and the transfers which have taken place *inter vivos* prior to death as constituting one entire estate upon the aggregate value of which the graduated rates are imposed.

So far as the tax attempts to reach property which was not only no part of the estate of the deceased at his death, but had been validly and irrevocably transferred before the passage of the Act, it is, we submit, invalid as violative of the Fifth Amendment of the Federal Constitution.

We fully recognize that it has been said that the power of taxation granted to Congress by the Constitution is not subject to any limitation to be found in the Fifth Amendment. The cases where such expressions were used, however, were cases where the particular exaction was plainly within the taxing power. Here the contention is that the Government is not proceeding in accordance with its taxing power. It is attempting to tax a privilege that has been fully exercised and we contend that this furnishes no better basis for the imposition of an excise than as if the privilege had never existed. Where the question before the Court is whether Congress is proceeding under its constitutional authority to levy excises, or is taking property without such authority, it cannot be dismissed by a mere statement that the Fifth Amendment is not a limitation on the taxing power.

We submit that it cannot be denied that if Congress had directly attempted to tax transfers of the sorts described made prior to the passage of the Act, the conclusion that it would constitute a deprivation of property without due process of law could not be avoided. As was said in *People* v. *Trust Company of America*, 205 N. Y. 74, 77, by Chief Judge Cullen, speaking for the New York Court of Appeals with respect to a mortgage excise tax:

> "The Legislature could not impose such a tax upon the defendant for a transaction which, at the time it was effected, was subject to no tax."

Even the states,—whose power of transfer taxation is, to say the least, as broad as that of the Federal Government,—have with practical unanimity disavowed any power to tax transfers which have become fully effective prior to the passage of the Taxing Act. These cases are fully covered in the brief on behalf of the plaintiff in error in No. 236, pages 36 to 49, and there is no necessity here to repeat the argument or the citations.

The validity of a Federal excise tax, retroactive to a limited extent, has been recognized by this Court. Thus the Corporation Tax Act of 1909, (36 Stat. c. 6, 112-113), which became a law on August 5th of that year, was applicable to the period beginning January 1st, 1909, and was sustained (*Flint* v. *Stone Tracy Company*, 220 U. S., 107). The Income Tax Act of October 3, 1913, (38 Stat. 166) was held to be valid with respect to the period from March 1st, 1913, as the retroactivity did not go beyond the adoption of the Sixteenth Amendment. *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, 20. (See also *Stockdale* v. *In-*

surance Companies, 20 Wall, 323, 331). And in *Billings* v. *United States*, 232 U. S. 261, 282, the tax with respect to the use of foreign built yachts enacted in August, 1909, (36 Stat. 112) was held to be valid as applied to the taxes payable on September 1st, 1909, though retroactive with respect to the first annual period. In these cases, however, there was simply a selection by Congress of a normal fiscal or taxable period to which the tax applied, and the Act had relation merely to the commencement of the current term or period in the course of which the Act was adopted. These cases furnish no support for the taxation of a privilege which had been fully and completely exercised prior to the passage of the taxing act, and wherein is involved no element of continuity of use extending beyond the date of such passage. An attempt to tax an owner or his estate with respect to a transfer fully consummated before the passage of the Act, but based upon the value of the property at a time subsequent to its transfer would, we submit, clearly transcend the limit of the discretion of Congress in the imposition of excise taxes and would constitute in no true sense an excise but merely an arbitrary and unwarrantable exaction.

If, as we submit to be plain, the tax upon the past transfer cannot be justified as a transfer tax or an excise tax, it can only be regarded as a direct tax upon property by reason of its ownership. Indeed, in the leading case of *Matter of Pell*, 60 App. Div. 286, 171 N. Y. 48, the New York Appellate Division attempted to sustain a Transfer Tax upon a transfer fully consummated prior to the passage of the Act, which it stated could therefore not be imposed as a transfer tax, upon

the theory that it was a direct tax upon property. The Court of Appeals reversed the decision upon the ground that the Legislature had had no intention of imposing a direct tax, but had intended to impose a transfer tax which, it was held, could not validly be done. But the possibility upon which the Appellate Division seized in an attempt to sustain a Transfer Tax upon a past transfer is not available to the Government in this case, because if such a tax were a direct tax upon property it would be void as not apportioned in accordance with the constitutional requirements.

This Court in *Brushaber* v. *Union Pacific Railroad,* 240 U. S. 1, 15, gives expression to the now accepted view that a direct tax on property is one laid because of ownership. This, however, cannot be taken to mean that a direct tax must be laid on property because of ownership by any particular persons or persons, nor can it be taken to mean that a direct tax can be laid without apportionment merely by calling it a transfer tax or death duty. Regard must be had to the substance of the matter and not to mere forms of expression. When it is said that a direct tax is one laid on property by virtue of ownership, what is plainly meant is that it is laid on property in fact, rather than upon a taxable use of property, and when it appears that the intent of the Act is not to impose a succession tax but to reach a certain amount of property collectively considered and to make it pay a tax at a progressive rate, based upon the value of the property at death, although it has been irrevocably transferred not only prior to the death but prior to the passage of the Act which imposes the tax, we submit that it is clear

that the tax thus laid is essentially a direct tax upon the property.

The argument which was advanced in the lower Court in two of the cases now before this Court, to the effect that the tax is only upon the property transmitted at death, and that the property transferred prior to death and, indeed, prior to the Taxing Act, is considered only for the purpose of measuring the tax, remains to be considered.

This appeal to the well known discretion of Congress in the measurement of excise taxes must fail when applied to the construction of the Act here under discussion. Resort was had to the same argument in *Knowlton* v. *Moore,* 178 U. S. 41, but met with the following blunt dismissal by Mr. Justice White (page 76):

> "The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated."

If the Government's theory of measurement were upheld in the present case, it would go far

beyond any decision thus far made under such power. This is not a case like *Flint* v. *Stone Tracy Co., supra,* where the inclusion of non-taxable factors in the measurement of the tax was incidental merely and indeed necessary to produce fairness of operation between tax-payers. It is not necessary to repeat the citation of authorities on this point contained on pages 80 to 88 of the brief of the plaintiffs-in-error in No. 236.

If property transferred prior to the Act were included to measure the tax payable by reason of the transfer which took place subsequent to the Act, such inclusion would not be incidental. There is no necessary correlation between the two transfers. There is no inconvenience in their separation. They rest upon wholly different theories. And we are by no means willing to assume that, if Congress had been advised that it could not reach the past transfer by a tax operating directly upon it, it would have resorted to the subterfuge of measuring a tax which it could validly lay by the value of the property, the transfer of which was beyond its constitutional power to reach without apportionment.

We cannot too often repeat that, unlike prior death duties imposed by Congress, the present Estate Tax Law is imposed upon the donor on account of his transmission of property upon his death. To tax him through his executor, upon the value of property which he has not owned for years prior to the passage of the Act is, plainly speaking, a tax upon one man based upon property owned by another. It is plainly beyond the pale of any power which Congress has ever been conceived to possess over taxation.

Moreover, while we are fully aware that the argument that a Federal death duty interferes with

the control by the States over the devolution of property, was fully considered and laid aside in *Knowlton* v. *Moore*, and *New York Trust Company* v. *Eisner, supra,* we do suggest that those decisions do not answer the case of one who, like Mrs. Cummings, has by the Government's construction of the present law been wholly deprived of any practical enjoyment of the privilege, which it has always been supposed that the State of New York conferred upon its citizens, of disposing of some part at least of the estate which she was fortunate enough to own at death, by will or under the intestate laws of that state.

As Judge Rose said in *Curley* v. *Tait*, 276 Fed. 840, 844:

> "The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in Wright *v.* Blakeslee, supra, or in Cahen *v.* Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.
>
> "It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat

> the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. *v.* Snow, supra."

We recognize, of course, that there can be no test of absolute equality in taxation. Incidental inequalities are bound to occur. But if the present act be construed in accordance with the contention of the government, inequalities deliberately enacted will be sanctioned. A theory of measurement of a tax which involves the possibility of wiping out a man's entire estate by reason of something which he has done before the act was passed and which he is powerless to undo after its passage, is not taxation but confiscation. Taxation had a definite meaning to the framers of the Constitution. That the power of Congress to levy exactions is subject to certain "limitations arising from those fundamental conceptions of free government which underlie all constitutional systems" has never been denied by this court. (*Knowlton* v. *Moore*, 178 U. S. 41, 77; *McCray* v. *United States*, 195 U. S. 27.) And when an exaction transcends those limitations it is void.

We submit that the constitutional requirements that what is in fact a direct tax must be apportioned, may not be avoided by calling it the measure of an excise tax. No power existed to tax these transfers directly by excise taxation.

There was neither necessity, reasonableness nor convenience to justify making them the measure of an excise tax upon another transfer. The imposition of a tax measured by the value of the property at the time the tax was levied, no matter when the transfer was made, can only be considered, in the absence of a use of the property justifying an excise, as a direct tax upon that property. This being the substance of the matter nomenclature is unimportant.

The limitations of the Constitution over Congressional action are no less important when they are express than when they are implied. In *Evans* v. *Gore*, 253 U. S. 245, the attempt was made to support the taxation of the income of a Federal Judge from his position by calling its inclusion a mere incident of a tax imposed with respect to his income. The court, however, rejected such a theory and held that it would be an attempt to reach income which impliedly was exempt from taxation and that such an attempt was ineffectual.

The power of the court to look through the form of a taxing act to its true substance and effect, should certainly be not less broad than the judicial power to pierce the veil of the corporate form, for instance, to ascertain the truth of transactions which would otherwise be hidden. Illustrations leap to the mind. Thus there is no doubt that Congress has power to levy an excise tax upon the transfers of shares of corporate stock based upon the value of that stock; but suppose Congress in taxing the transferor of stock certificates attempted to measure the tax, not by the value of the stock transferred, but by the aggregate value of all the stock which the particular transferor had ever transferred in the past.

Would there be the slightest question that such a levy was beyond the constitutional power of Congress? And is there any substantial distinction between such an attempted tax and a tax upon the transfer of an estate passing at death measured by the present value of all the property which the decedent had given away in his lifetime? Such a tax is either a direct tax, void because unapportioned, or an exaction which does not fall within the meaning of taxation at all and so void as constituting a deprivation of property without due process of law.

III.

If the act be construed so as to impose liability upon the transferee under a transfer irrevocably effected prior to the passage of the act, it is beyond the constitutional power of Congress.

All the arguments set forth in point two above apply with equal force to the attempt to impose a secondary liability, in case the executor has not sufficient estate in his hands to pay the tax, upon the transferee under a transfer validly and irrevocably made before the passage of the Act. In addition, it is not possible for the Government in cases of this sort, of which No. 303 is an example, to fall back upon the measurement theory discussed in the last point, for by hypothesis the net estate, the transfer of which according to that argument is the only thing taxed, has been completely exhausted before the liability of the transferee can attach.

The authorities that a transfer tax cannot be imposed upon a past transfer apply as well where the attempt is made to collect the tax from the transferee as where it is made payable by the transferor, and indeed most of the state court cases to which reference has been made have been of the former sort, for they arose under inheritance tax laws.

Nor is it admissible to construe the Estate Tax Law as being dual in character, i. e., laid upon the transmission of property insofar as the executor is concerned, but upon the receipt of property insofar as the liability of the transferee is concerned. We have already pointed out that from its essential characteristics this Act cannot be construed as levying a tax upon the receipt of property, and that the nature of the tax is not altered by the imposition of a secondary liability upon the transferee.

It must never be overlooked that the liability of the transferee is secondary only and this fact is of cardinal importance in the construction of the Act. If the Act imposed in any sense a tax based upon the receipt of property by the transferee, the transferee would be made primarily liable to pay the entire tax based upon the amount of the property which he received, and if the executor paid a part of his tax the executor would be given a right of reimbursement from the transferee; instead the transferee paying the tax is given a right of reimbursement against the executor, except in cases in which the funds in the hands of the executor have already been completely exhausted.

The significance of the absence of any provision, in the case of an executor who has sufficient

assets of the decedent to pay the tax, for recourse to the transferees of property transferred in the decedent's lifetime is emphasized by the amendment introduced in the Revenue Act of 1918. By Section 402 of that Act the amount of life insurance upon the decedent's life in excess of $40,000 receivable by beneficiaries other than the executor or administrator is to be included in computing the value of the gross estate. Under Section 408 of that Act the executor is entitled to recover from such beneficiary "such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate." This express provision for recovery by the executor against the beneficiary in the one case negatives the possibility of implying such a right in other cases.

Moreover, any attempt to impose the tax upon the transferee upon the theory that it is levied by reason of his receipt of property, would fall under the rule of *Knowlton* v. *Moore*, *supra*, that an Act could not validly be construed so as to determine graduated rates which the transferee should be obliged to pay upon a transfer to himself, by reference to the amount of property that had been transferred to others.

We may therefore reiterate that decisions such as *Wright* v. *Blakeslee*, 101 U. S. 174, made under succession tax acts, imposed upon the receipt rather than upon the transmission of property, will not avail to sustain the attempt to impose liability upon the transferee under the present Act on account of a transfer made prior to its passage. The transferees do not pay with respect to any "succession" but with respect to certain *quantum of property*, and then only because the

entire tax as computed upon the entire supposed constructive estate of the decedent has not been paid out of assets left by him.

As above pointed out the cases under succession taxes, even if they could be regarded as applicable to the present act, would not justify this attempt to tax a past transfer. Succession taxes are imposed upon the devolution of title to property on the occasion of death. So far as the power of the State to impose such taxes is concerned, they have been sustained upon the ground that the right to receive property on the occasion of death is not a natural right but is a privilege granted by the State and subject to recall in whole or in part before this privilege is fully exercised. *Mager* v. *Grima*, 8 How. 490; *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Cahen* v. *Brewster*, 203 U. S. 543.

Where, however, the privilege has been fully exercised and the devolution of title has been complete before the State exerts its power over the succession, there is nothing upon which a succession tax may operate. As stated by Mr. Justice Holmes in *Chanler* v. *Kelsey*, 205 U. S. 466, 480:

> "* * * such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the

> continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way in which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69."

While this statement is contained in a minority opinion, we submit that it represents a view of the nature of a succession tax which has at all times commanded the assent of this court. The decision of the majority in that case was not opposed to this principle. In that case the State of New York had imposed a transfer tax upon the exercise of a power of appointment which took place after the taxing act went into effect. The power, however, had been created by a trust deed executed prior to the passage of the act. The court sustained the tax as within the constitutional power of the state, not upon the ground that there was a coming into possession or enjoyment after the act took effect, or upon the ground that the State could tax successions retroactively, but solely upon the ground that until the power of appointment was exercised the estate had not become vested in the beneficiaries. The plain intimation of the opinion was that if a vested interest had been created prior to the passage of the act, the State could not impose a succession tax, whatever its right to impose other taxes might have been. The court places its decision squarely upon the ground that no estates had become vested until the donee of the power executed the same after the passage of the transfer tax law. Mr. Justice Day, writing for the court, said (pp. 473, 474):

"However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs-in-error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others."

It was thus recognized by the court that in order to sustain the tax as a succession tax, it was necessary to find that some element was wanting with regard to the vesting of title to the succession until the exercise of the power of appointment.

It may be said that we know of no authoritative decision in which a tax has been upheld as a succession tax when it appears that the succession has completely vested in title prior to the passage of the Taxing Act, (compare *Matter of Lansing*, 182 N. Y. 238; *Minot* v. *Treasurer and Receiver General*, 207 Mass. 588).

How much more conclusively does the rule, that no tax can be applied to a transfer where the vesting of title has been fully effected prior to the passage of the Act, govern a tax upon the transmission of the decedent's estate, rather than upon the receipt of a succession. The decedent has completed the transfer at a time when it was subject to no tax. He had no power to transfer or in any manner affect the title to the property after the passage of the Act. No kind of transfer took

place upon his death. Nothing happened upon his death which would furnish the occasion of an excise duty.

We submit that an exaction of money from one who has been in the past given property, because the person who transferred it to him at a time when the transfer was not taxable, has since died, is beyond the pale of excise taxation. If a tax at all, it is a direct tax levied upon the property of the transferee by reason of his ownership of it,—an ownership validly and completely acquired before the Act took effect. At the time of the passage of the Estate Tax Law of 1916, property which had been theretofore transferred by deeds in contemplation of death, or to take effect in possession or enjoyment at or after death,—if such deeds were not ambulatory,—differed in no respect, so far as the validity of the title was concerned, from property which had been transferred by any other sort of deed. The property was as completely owned by the transferee as any other property.

A tax laid upon the transferee of that property is in truth and substance a tax upon the property, because of its ownership by the transferee, and hence void if unapportioned.

IV.

The Estate Tax Act of 1916 should not be construed so as to work oppression or disturb vested rights or raise doubts with respect to its constitutionality. Such a construction is neither necessary nor natural.

It is in the light of the constitutional principles already discussed that the question of the construction of the act should be approached. It is manifest that the power of Congress to reach back into the past and impose a singularly oppressive levy with respect to transactions which had been completed prior to the passage of the act, is, to say the least, doubtful. The court will, therefore, not give a construction to the act which raises such doubts unless this construction is imperatively required by the language used by Congress.

Moreover it should not be assumed that Congress deliberately intended to impose an arbitrary and unreasonable exaction in the guise of an excise tax. If the act may be construed so as to operate justly, it should be assumed that it was the intent of Congress that it should so operate. If this court is to impute to Congress an intention to enact a plain injustice, it should find this intent in the most clear and unmistakable language.

On the contrary, when the provisions of the act are examined it is submitted that they not only do not require any such construction but that they do not even justify it. The dominant intent of Congress was to impose a tax "upon the transfer of the net estate of every decedent dying after the passage of this act." The experience of the States had shown that certain forms of conveyance had

been availed of to avoid the imposition of inheritance taxes. Congress did not intend that its estate tax should be thus avoided. It, therefore, provided that there should be included in the net estate not only the property actually passing at death, but property passing under conveyances which might be resorted to in order to avoid the tax imposed. The general intention of Congress was wholly prospective. Thus in Section 209, the act provides:

> "If the decedent *makes* a transfer of, or *creates* a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * * the transferee or trustee shall be personally liable for such tax," (italics ours).

Nothing could show more clearly the intent of Congress than this provision. It realized that it was imposing a new form of taxation. It also knew that attempts would be made to avoid the tax by transfers *inter vivos*. It knew that if a person transferred all his property to trustees he would leave no estate out of which the Federal estate tax could be paid. It, therefore, provided that in such cases the property and the transferee should be liable for the tax to the extent of decedent's interest at the time of the transfer. The language used is wholly prospective and it shows clearly that the motive and purpose of Congress, in including within the net estate the value of property transferred by such deeds, was to prevent the avoidance of the tax. There is not a line in the act which indicates an intent upon the part of Congress to interfere with estates that had already become vested, or to impose a tax upon transfers which, having been made prior to the

Act, could not possibly have been made to avoid its provisions.

The argument of the Government wholly ignores not only these broad considerations of the intention of Congress, but also the literal terms of the act as expressed in Section 209 above quoted. It rests its case entirely upon the isolated phrase "at any time" in Section 202. Nothing could be added to the powerful analysis of this argument in the brief submitted by plaintiffs in error in these cases. There is no necessity for repeating it here.

The language of the Act may be given full significance without overriding the dominant intent of Congress as expressed in the act and without imputing to Congress a desire to levy its estate taxes in an oppressive, arbitrary or unequal manner.

Respectfully submitted,

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